SUBJECT INDEX

Page

Reply Brief of Petitioners William L. Hamling, Reed Enterprises, Inc. and Library Service, Inc. .. 1

Preliminary Statement 1

Argument 4

I

The Provisions of Title 18 United States Code §1461, on Their Face and as Construed and Applied to Petitioners' Pre-June 21, 1973 Conduct, Violated the Guarantees of the First and Fifth Amendments to the United States Constitution, Because They Failed to Provide "Fair Notice" or "Concrete Guidelines" as to What Sexual Expression Was Prohibited by the Provisions of the Statute 4

A. Prior to June 21, 1973, §1461 Was Unconstitutionally Vague, Because It Failed to Contain a Description of the Conduct Miller Held Was Constitutionally Mandated and the Statute Had Not Received a Prior Authoritative Construction Reading the Necessary Terminology Into the Statute 4

B. Prior to June 21, 1973, §1461 Was Unconstitutionally Vague, Because the Statute Was Authoritatively Construed as Requiring Proof That Charged Publications Offend National Standards, Which Nationwide Standards This Court Found Were Unascertainable, Unprovable and Nonexistent 7

Page

C. Prior to June 21, 1973, the Statute Was Authoritatively Construed as Requiring Proof That Charged Publications Appeal to the Prurient Interest of the Average Person in the Nation as a Whole, Which Test This Court Labeled "Unrealistic" .. 10

D. Prior to June 21, 1973, §1461 Was Unconstitutionally Vague Because It Utilized an Unworkable and Ambiguous Test—the "Utterly Without Redeeming Social Value" Test 11

E. Prior to June 21, 1973, §1461 Was so Vague, Ambiguous and Unworkable That This Court Was Required to Adopt the Redrup Approach of Deciding Each Case on an Ad Hoc Basis, Without Attempting to Offer Guidance to Those Subject to the Provisions of the Statute 12

II

In Light of This Court's June 21, 1973 Rulings, the Indictment Herein Is Fatally Defective Because It Failed to Inform Petitioners of the Nature and Cause of the Accusations Against Them in Violation of the Provisions of the Sixth Amendment 13

III

The Provisions of Title 18 United States Code §1461, on Their Face and as Construed and Applied to Authorize the Jury to Measure the Prurient Appeal of the Brochure by Its Impact on Undefined Sexually Deviant Groups Rather Than Solely by Its Impact on the

Page

Average Person in the Nation as a Whole, Violated the Free Speech and Press Provisions of the First Amendment and the Due Process Provisions of the Fifth Amendment 17

IV

The Provisions of Title 18 United States Code §1461, on Their Face and as Construed and Applied, Violate the Free Speech and Press Provisions of the First Amendment and the Due Process Provisions of the Fifth Amendment, Because the Trial Court Instructed the Jury That It Could Find the Brochure Obscene Even if the Brochure Did Not Meet the Roth-Memoirs Test if the Jury Found "Pandering", Notwithstanding the Fact That Neither the Statute nor the Indictment Fairly Advised Petitioners That They Were Charged With Pandering 20

V

The Brochure at Issue Is Protected by the Free Speech and Press Provisions of the First Amendment to the United States Constitution. It Is Neither Obscene in Fact nor in Law 22

VI

Petitioners Were Denied a Fair Trial, and Due Process of Law, When the Trial Court, in Open Defiance of Rule 30, Federal Rules of Criminal Procedure, Denied Petitioners the Opportunity to Make Objections to the Court's Jury Charge Outside the Presence of the Jury 23

VII

Page

Petitioners Were Denied a Fair Trial by an Impartial and Representative Jury, in Violation of the Guarantees of the Fifth and Sixth Amendments 26

A. The Trial Court Abused Its Discretion and Denied Petitioners Due Process of Law When It Refused to Grant a Short Continuance Which Would Have Afforded Petitioners a Jury Panel Which Did Not Systematically and Absolutely Exclude All Persons Under 24 Years of Age 26

B. The Trial Court Abused Its Discretion and Denied Petitioners Due Process of Law When It Improperly Refused to Ask Prospective Jurors Questions on Voir Dire Designed to Expose Their Biases and Prejudices Concerning "Obscenity" and Sex 28

VIII

Petitioners' Fifth Amendment Rights to a Neutral and Unprejudiced Grand Jury Were Violated Because the Government Attorney Made Biased and Prejudiced Remarks to the Grand Jury Which Returned the Indictment 29

Conclusion 29

TABLE OF AUTHORITIES CITED

Cases	Page
Blount v. Rizzi, 400 U.S. 410	5
Delaney v. United States, 199 F.2d 107 (1 Cir. 1952)	27
Ginzburg v. United States, 383 U.S. 463	5, 22, 23, 29
Groppi v. Wisconsin, 400 U.S. 505	27
Hall v. United States, 378 F.2d 349 (10 Cir. 1967)	25
Hodges v. United States, 243 F.2d 281 (5 Cir. 1951)	24
Irvin v. Dowd, 366 U.S. 717	27
Jacobellis v. Ohio, 378 U.S. 184	5, 6, 8
Lovely v. United States, 169 F.2d 386 (6 Cir. 1948)	24
Manual Enterprises, Inc. v. Day, 370 U.S. 478	5, 6
Memoirs v. Massachusetts, 383 U.S. 413	3, 10, 12, 14, 20
Miller v. California, 413 U.S. 15	3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 20, 22, 30
New York Times Co. v. Sullivan, 376 U.S. 254	23
Paris Adult Theatre I v. Slaton, 413 U.S. 49	12
Pent-R-Books, Inc. v. U.S. Postal Service, 328 F. Supp. 297 (E.D. N.Y. 1971)	22
Rabe v. Washington, 405 U.S. 313	15
Redrup v. New York, 386 U.S. 767	7, 10, 12
Roth v. United States, 354 U.S. 476	3, 5, 12, 14, 20
Rowan v. U.S. Post Office Dept., 397 U.S. 728	22

Page

Russell v. United States, 369 U.S. 749 ..... 15, 19

Sheppard v. Maxwell, 384 U.S. 333 27

Smith v. California, 361 U.S. 147 23

Smith v. United States, 360 U.S. 1 17

Sulton v. United States, 249 F.2d 385 (5 Cir. 1957) 24

Swain v. Boeing Airplane Co., 337 F.2d 940 (2 Cir. 1964) 24

Thornhill v. Alabama, 310 U.S. 88 6

United States v. Bass, 404 U.S. 336 16

United States v. Beard, 414 F.2d 1014 (3 Cir. 1969) 16, 17

United States v. Fernandez, 456 F.2d 638 (2 Cir. 1972) 25

United States v. Fiorito, 465 F.2d 431 (7 Cir. 1972) 3, 16

United States v. Friedman, 488 F.2d 1141 (10 Cir. 1974) 9

United States v. Groner, 475 F.2d 550 (5 Cir. 1972) 14

United States v. Groner, 479 F.2d 577 (5 Cir. 1973) 7, 8

United States v. Hall, 200 F.2d 957 (2 Cir. 1953) 24

United States v. Huffman, 467 F.2d 189 (6 Cir. 1972) 25

United States v. Manuszak, 234 F.2d 421 (3 Cir. 1956) 17

United States v. Orito, 413 U.S. 139 13

Page

United States v. Palladino, ... F.2d .... (1 Cir. No. 72-1005, Jan. 5, 1974) 3, 4

United States v. Pellegrino, 467 F.2d 41 (9 Cir. 1972) 21

United States v. Pinkus, 333 F.Supp. 928 (C.D. Calif. 1971) 21

United States v. Rosenthal, 470 F.2d 837 (2 Cir. 1972) 27

United States v. Schartner, 426 F.2d 470 (3 Cir. 1970) 25

United States v. Thevis, 484 F.2d 1149 (5 Cir. 1973), cert. pending No. 73-1091 4

United States v. Titus, 221 F.2d 571 (5 Cir. 1955) 24

United States v. 12 200-Ft. Reels, 413 U.S. 123 .. 13

United States v. Vuitch, 402 U.S. 62 15

Rules

Federal Rules of Civil Procedure
§51 .....23, 24

Federal Rules of Criminal Procedure
§30 .....23, 24, 25

Statutes

United States Code App., Title 18
§1202(a) 16

United States Code, Title 18
§1461 .....3, 4, 5, 7, 11, 12, 13, 17, 21, 22, 29

United States Code, Title 39
§3008 .....21, 22
§3011(e) 21, 22

United States Constitution Page

First Amendment 3, 4, 10, 17, 20, 22, 23

Fifth Amendment 4, 17, 20, 26, 29

Sixth Amendment 13, 26

Miscellaneous

Report of the Commission on Obscenity and Pornography 1, 2

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-507

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID THOMAS, and LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Reply Brief of Petitioners William L. Hamling, Reed Enterprises, Inc. and Library Service, Inc.

Preliminary Statement.

Petitioners received the Government's 78-page Brief on April 8, 1974, one week before argument.

The Government states, erroneously, that petitioners engaged in "a scheme" to distribute a book entitled *The Illustrated Presidential Report of the Commission on Obscenity and Pornography* [Govt. Br. 4]. There was no scheme. Petitioners openly advertised and sold the book with the publisher's name and address prominently displayed. The book contained *all* of the text of

the *Report of the Commission on Obscenity and Pornography* and numerous photographs which the Government stipulated were the same type of pictorial material used in connection with the Commission's work [J.A. 163-166]. *The Illustrated Report* was developed around the public domain work, the *Report of the Commission on Obscenity and Pornography*, an official Government document printed by the United States Government Printing Office. The official *Commission Report* unquestionably has serious political and scientific value. Dr. Otto N. Larsen, one of the Commissioners and Chairman of the Effects Panel of the Commission, testified that *The Illustrated Commission Report*, with its pictures, was more valuable than the official *Commission Report*, without illustrations [R.T. 4229-4230, 4237, 4240-4242, 4257-4258, 4263, 4266, 4270, 4272, 4285-4286]. Dr. W. Cody Wilson, the Executive Director and Director of Research of the Commission, also testified that *The Illustrated Report*, with its pictures, was more valuable than the official *Commission Report* [R.T. 3354].

The brochure, found obscene by the jury, fairly and accurately advertises the book. It advises the reader, accurately, that the book contains the complete text of the official *Commission Report*, and that the pictures contained therein could have been used as part of the studies made by the Commission. The brochure emphasizes the political and scientific value of the book it advertises.

Inexplicably, the Government suggests that petitioners called only one witness (Professor Swain) on the issue of the social value of the brochure [Govt. Br. 10]. The Court of Appeals correctly observed that four of petitioner's experts "testified that in their opinion the

Brochure had redeeming social value and was not obscene" (481 F.2d at 311) [See, Br. for Pets. Hamling, *et al.*, 11, 62-65].

The Government recognizes that petitioners have been caught in a period of transition, their prosecution having taken place before *Miller* was decided. To find a solution to the dilemma thus created, the Government looks to *United States v. Palladino*, ...F.2d.... (No. 72-1005, 1 Cir. 1974), where the Court said: ". . . [W]ith due regard for First Amendment rights we adopt the position that . . . the material allegedly in violation of 18 U.S.C. §1461 must be found to be obscene under both the *Miller* and *Roth-Memoirs* standards or the defendants must be acquitted." (Slip Op. 2-3).

Whatever view this Court may take with regard to the constitutionality of §1461 as applied to petitioners' pre-June 21, 1973 conduct, it seems plain that the Indictment herein must be dismissed since it plainly does not allege that the brochure was obscene under both the *Miller* and the *Roth-Memoirs* standards. See, *United States v. Fiorito*, 465 F.2d 431, 432 (7 Cir. 1972).

ARGUMENT.

I

The Provisions of Title 18 United States Code §1461, on Their Face and as Construed and Applied to Petitioners' Pre-June 21, 1973 Conduct, Violated the Guarantees of the First and Fifth Amendments to the United States Constitution, Because They Failed to Provide "Fair Notice" or "Concrete Guidelines" as to What Sexual Expression Was Prohibited by the Provisions of the Statute.

A. Prior to June 21, 1973, §1461 Was Unconstitutionally Vague, Because It Failed to Contain a Description of the Conduct Miller Held Was Constitutionally Mandated and the Statute Had Not Received a Prior Authoritative Construction Reading the Necessary Terminology Into the Statute.

In *Miller*, the Court said that under "the holdings announced today no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating . . . law as written or construed." (413 U.S. at 27). In *United States v. Palladino*, ... F.2d .... (No. 72-1005, 1 Cir. 1974), the court stated that §1461 "does not contain the specifics" *Miller* requires (Slip Op. 3). In *United States v. Thevis*, 484 F.2d 1149 (9 Cir. 1973), cert. pending, No. 73-1091, the court said: "On its face, this statutory terminology ['obscene, lewd, lascivious or filthy'] does not contain the specifics required by *Miller* . . . . *Miller* requires that elements of the definition be a part of the statute." (484 F.2d at 1155).

In spite of all this, the Government asserts that "there is no basis for concluding that 18 U.S.C. 1461 was void on its face before *Miller* was decided." [Govt. Br. 22].

The fact is that §1461 is facially defective. That however does not, of course, answer all questions. As the Government correctly points out [Govt. Br. 20], *Miller* was not a holding that *all* obscenity statutes were unconstitutional."Existing statutes, as construed heretofore or hereafter, may be adequate." (*Miller*, 413 U.S. at 24, n. 6).

The Government argues, weakly, that "heretofore" §1461 had received a saving authoritative construction reading into the Section the requisite "specific sexual conduct".[1] The "specific conduct", according to the Government, "was derived from those materials judicially found to be obscene (or nonobscene) in past cases" [Govt. Br. 22]. Reliance was placed upon Justice Stewart's dissenting opinion in *Ginzburg v. United States*, 383 U.S.463, 499, n. 3; Justice Stewart's concurring opinion in *Jacobellis v. Ohio*, 378 U.S.184, 194; and *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 489-490. Neither Justice Stewart's dissenting opinion in *Ginzburg* nor his concurring opinion in *Jacobellis* qualifies as an authoritative construction of the statute. In *Jacobellis*, Justice Stewart observed that it is possible to read the Court's opinion in *Roth* in a variety of ways. He then observed that the Court was there faced "with the task of trying to define what may be indefinable". (378 U.S. at 197). Justice Stewart concluded that it was not likely that he could ever succeed in intelligently defining the kinds of material embraced within the concept of hard core pornography.

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[1]See, Br. for Pets. Hamling, *et al.*, 24 n. 4. See also, *Blount v. Rizzi*, 400 U.S.410, 419.

The Government points to some old cases cited in *Jacobellis* by Justice Stewart (378 U.S.184, 197, n. 1), but they hardly afford "fair notice" or "concrete guidelines" as to what is obscene under the statute. The Government's reliance on *Manual Enterprises, Inc. v. Day, supra,* is equally futile. In *Manual,* Justice Harlan, speaking for himself and Justice Stewart, said: "Whether 'hard-core' pornography, or something less, be the proper test, we need go no further in the present case than to hold that the magazines in question . . . cannot, under any permissible constitutional standard, be deemed to be beyond the pale of contemporary notions of rudimentary decency. . . . Our own independent examination of the magazines leads us to conclude that the most that can be said of them is that they are dismally unpleasant, uncouth and tawdry. . . . Of course not every portrayal of male or female nudity is obscene. . . ." (370 U.S. at 194).

It thus appears that §1461 is facially defective and that prior to June 21, 1973 no prior saving construction had been placed on the statute. Nevertheless, the Government argues that "petitioners are in no position to complain, because the statute was clearly constitutional as applied to them" [Govt. Br. 22]. This approach is at war with the statement made in *Miller* that no one will be subject to prosecution unless they are prosecuted pursuant to a valid statute containing "fair notice" and "concrete guidelines". See also, *Thornhill v. Alabama,* 310 U.S.88. Moreover, since petitioners presented weighty evidence that the brochure is not obscene, there is simply no basis for the Government's contention that the statute was "clearly" constitutional as applied to petitioners. The Government's own witness, Mr. Getlein, testified that a photo-

graph of a female touching the genitalia of a male and a picture of fellatio could be within community standards [J.A. 152-153].

Additionally, it should be remembered that under the "utterly without redeeming social value" test, it was virtually impossible for the Government to obtain a constitutionally valid conviction under §1461 [See, Govt. Br. 19-20, 32, 33]. Finally, at the time the brochure was mailed, this Court was deciding cases under the "subjective" *Redrup* test. Under that subjective test, which prevailed at the time of trial, it is certain that if Justice Black[2] were still sitting five members of the Court would find for petitioners [See, Govt. Br. 34].

B. Prior to June 21, 1973, §1461 Was Unconstitutionally Vague, Because the Statute Was Authoritatively Construed as Requiring Proof That Charged Publications Offend National Standards, Which Nationwide Standards This Court Found Were Unascertainable, Unprovable and Nonexistent.

The Government expresses a preference for utilizing local standards in federal obscenity cases [Govt. Br. 26]. Relying on *United States v. Groner*, 479 F.2d 577 (5 Cir. 1973), the Government argues that "the jurors in federal obscenity cases should be permitted to draw on those standards with which they are familiar, and not apply standards . . . about which the jurors may know very little" [Govt. Br. 28-29]. In *Groner*, the court also said: "It does not seem reasonable or sensible to require a jury in federal criminal obscenity cases drawn from a single district or division to assess the thinking of the average person in

[2]Justice Black of course was a member of the Court when the brochure was mailed.

the community, to consider the common conscience of the community, or the present-day standards of the community if the word 'community' is to include all of the people within the boundaries of this vast nation North, South, East and West." (479 F.2d at 583).

In *Miller*, this Court stated that our Nation is too big and too diverse for the Court to be able to articulate a single formulation of national standards, "even assuming the prerequisite consensus exists. To structure an obscenity prosecution around evidence of national community standards would be an exercise in futility". (413 U.S. at 30). The Court asserted that national standards were "unascertainable" (413 U.S. at 31-32). The Court cited with approval Chief Justice Warren's observation in *Jacobellis v. Ohio*, 378 U.S.184, 200, that "there is no provable 'national standard' . . . . [I]n all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."

Ignoring the fact that the jury could not determine whether the brochure offended national standards because such standards are not ascertainable, the Government asserts that there is "no reason to assume that juries in pre-*Miller* cases could not and did not determine a workable national standard" [Govt. Br. 29]. Juries, we are told, "are always guided by their perception of their community's values" and "the instructions to apply 'national standards' do not markedly change that perception." [Govt. Br. 30-31]. The Government here seems to suggest that the instructions

given to the jury in obscenity cases are, for all practical purposes, meaningless and that juries decide such cases by intuition, or bias.

Alternatively, the Government argues that if petitioners should have been tried under local standards it is "highly unlikely that the petitioners could have been prejudiced by the application of a national standard. . . . Petitioners could have benefited from the application of a local standard only on the unlikely hypothesis that jurors would have found their own community more permissive than the nation as a whole." [Govt. Br. 30]. *United States v. Friedman,* 448 F.2d 1141 (10 Cir. 1973), is the answer to this contention. "We are not prepared to hold or assume that in all instances the national standards are more lenient than all local standards. Further there are substantial unresolved questions as to the nature of the proof now required. . . . A consideration of the application of national or local standards should be initially made by the trial court in addition to the determination of what such standards may be." (488 F.2d at 1141-1142).

Moreover, the trial court herein excluded a survey and evidence of petitioners' witness, Virginia Carlson, establishing that a substantial majority of the 718 persons she interviewed in the San Diego area stated that the brochure in issue should be available to the public in general [R.T. 3922. See, Br. for Pets. Kemp, *et al.*, 68-69]. In excluding the evidence, the court stated that "the community standards we are concerned with here are the national standards. . . . How does this witness

bear at all on the national community standards?" [R.T. 3931]. At the close of the case when instructions were being discussed, government counsel observed that there was a typographical error using the word "county" instead of "country". Government counsel then stated: "If it was the county, perhaps Miss Jenny Carlson might have been a competent witness after all. But, of course, that is not the test." [R.T. 4492].

Finally, the Government argues that it does not matter what standards are applied since the brochure "is obscene under any standard" [Govt. Br. 31]. On the contrary, the brochure is constitutionally protected under *Miller*, *Memoirs* and *Redrup*. In *Miller*, the Court, quoting from *Roth*, said: "The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people." (413 U.S. at 350). (Emphasis added.) *The Illustrated Report* had as one of its goals the bringing about of political and social changes with regard to the right of willing adults to view sexually explicit material. The brochure emphasized this aspect of the book, and is not obscene.

C. Prior to June 21, 1973, the Statute Was Authoritatively Construed as Requiring Proof That Charged Publications Appeal to the Prurient Interest of the Average Person in the Nation as a Whole, Which Test This Court Labeled "Unrealistic".

The Government did not address itself to the question of whether national or local standards must be used in determining the issue of "prurient interest".

In *Miller*, the Court stated that under *Memoirs* a *national standard* of First Amendment protection had to be used in determining what appeals to "prurient

interest". (413 U.S. at 30-31). In the case at bar, national standards were *not* utilized on the issue of "prurience". Before trial, petitioners filed a Motion for a Bill of Particulars asking the Government to state whether it claimed that the advertisements "appealed to the prurient interest of the average person, in the Nation as a whole" [J.A. 36]. The Government's response was that it claimed that the advertisements "appealed to the prurient interest of the average person" but that "there is no requirement to show prurient interest of the average person 'in the nation as a whole'. The 'nation as a whole' requirement applies only to the issue of 'contemporary community standards.' " [J.A. 46]. The trial court never advised the jury by what standards it was to measure the "prurient appeal" of the brochure [Br. for Pets. Hamling, *et al.*, 50-52]. The jury was thus called upon to determine the issue of "prurience" abstractly, without reference to either a national or local standard. The statute, so construed, is unconstitutionally vague.

D. Prior to June 21, 1973, §1461 Was Unconstitutionally Vague Because It Utilized an Unworkable and Ambiguous Test—the "Utterly Without Redeeming Social Value" Test.

The Government argues that this Court rejected the "utterly without redeeming social value" test because it deprived the Government of the opportunity of obtaining "constitutionally valid convictions by imposing an 'impossible' standard of proof", rather than because the test was "unworkable and ambiguous" [Govt. Br. 19-20]. The Government's argument is that this Court found the "utterly without redeeming social value" test so all-encompassing that it effectively nullified the

statute. Whether the Court accepts the petitioners' interpretation or the Government's, the result is the same. Utilizing the "social value" test, it was impossible for a reasonable person to determine with reasonable certainty what was, and what was not, covered by §1461.

E. Prior to June 21, 1973, §1461 Was so Vague, Ambiguous and Unworkable That This Court Was Required to Adopt the Redrup Approach of Deciding Each Case on an Ad Hoc Basis, Without Attempting to Offer Guidance to Those Subject to the Provisions of the Statute.

The Government argues that this Court "never stated that the *Redrup* approach was necessitated because the *Roth-Memoirs* test was 'unworkable' " [Govt. Br. 33]. With all respect, a reading of Chief Justice Burger's opinion in *Miller* (413 U.S.22, n. 3) and Justice Brennan's dissenting opinion in *Paris* (413 U.S. at 82) makes it abundantly plain that the unsatisfactory *Redrup* approach was utilized because there was no other formula available to the Court. When petitioners allegedly mailed the brochure at issue, *Redrup* was the operative test for determining whether a publication was constitutionally protected or obscene. Concededly, *Redrup* failed to afford citizens "fair notice" or "concrete guidelines" as to what publications dealing with sex would be found obscene by five of the then sitting Justices, "subjectively judging" the publications, "applying their separate tests".

II

In Light of This Court's June 21, 1973 Rulings, the Indictment Herein Is Fatally Defective Because It Failed to Inform Petitioners of the Nature and Cause of the Accusations Against Them in Violation of the Provisions of the Sixth Amendment.

In *United States v. Orito*, 413 U.S.139, 145, this Court vacated the judgment of the District Court and remanded the case for reconsideration of the sufficiency of the indictment. The Government recognizes, as it must, that "since *Miller* and *12 200-Ft. Reels of Film* had *incorporated new specificity requirements into the statute* . . . it would be *necessary* for the District Court to *consider the sufficiency of the Indictment* in light of those cases." [Govt. Br. 36-37]. (Emphasis added.)

The Government apparently recognizes that if §1461 is defective on its face the Indictment, which repeats its words, would be similarly defective. Accordingly, the Government argues—in plain conflict with *Miller*—that the words "obscene, lewd, lascivious, indecent, filthy and vile", standing by themselves, afford the requisite "fair notice" and "concrete guidelines" required by the Constitution.

Moreover, the Government argues that the statutory words "obscene, lewd, lascivious, indecent, filthy or vile" had been defined by this Court in a number of cases "and had a definite meaning". Accordingly, the Government argues, "charging a violation of §1461 in the terms of the statute was sufficient" [Govt. Br. 34-35]. It is of course true that this Court has attempted to define the term "obscene" in a number of decisions, but it is decidedly not true that that term had, prior to June 21, 1973, "a definite meaning". On the contrary, this Court's early efforts at defining this "legal term of art" has

been tortured. Every member of the Court agrees that at least prior to *Miller* the attempt to identify "obscenity" was unsatisfactory.

The confusion surrounding the term "obscenity" was explored in *United States v. Groner*, both by the panel (475 F.2d 550 [5 Cir. 1972]) and by the court en banc (479 F.2d 577 [5 Cir. 1973]). Judge Gewin, speaking for the majority of the en banc court, stated that the familiar *Roth-Memoirs* test "represents an amalgam of the individual views of members and former members of the Court, taken from their respective concurring or dissenting opinions in *Roth* and subsequent decisions involving obscenity." (479 F.2d at 580). He concluded that the *Roth-Memoirs* test "is not the prevailing test" (479 F.2d at 580). In overruling the panel's decision in *Groner*, Judge Gewin stated: "[I]t is apparent that the panel opinion was decided on an erroneous view of the test to be applied in determining obscenity. Neither the 'patent offensive' nor the 'utterly without redeeming social value' elements are included in the test laid down by the Supreme Court, nor is the community national in scope." (479 F.2d at 583). Judge Ainsworth asserted that "accurate guidelines . . . based on past decisions of the Supreme Court, are hard to find." (479 F.2d at 586).

It thus appears that as late as May 1973—when *Groner* was decided—there was virtually total disagreement as to the definition of "obscenity" under the federal statute. Prestigious courts disagreed on the following issues:

(1) Whether the "utterly without redeeming social value" test was applicable;

(2) Whether the "patently offensive" test was applicable;

(3) Whether national or local standards were to be used in measuring "patent offensiveness";

(4) Whether national or local standards were to be used in determining appeal to prurient interest;

(5) Whether "pandering" could be utilized if it was not charged in the Indictment;

(6) Whether the "prurient interest" could be measured by a clearly defined sexually deviant group if the Indictment made no such charge;

(7) Whether, under §1461, the burden was on the prosecution to plead and prove that an accused knew the charged material was obscene

The Government asserts that "the allegation that the materials are obscene simply means the materials come within the legal definition of obscenity" [Govt. Br. 35]. This merely begs the issue since the question remains, what was "the legal definition of obscenity" prior to June 21, 1973? When, therefore, the Government asserts that the term "obscene" was "a legal term of art", the Government must be referring to abstract art.

The Government briefly brushes aside *Russell v. United States,* 369 U.S.749, without any real attempt to deal with its relevance to the case at bar [See, Br. for Pets. Hamling, *et al.,* 40-44]. The Government totally fails to discuss the other cases cited by petitioners dealing with the insufficiency of the Indictment. In *United States v. Vuitch,* 402 U.S.62, the Court stated that under the abortion statute there involved "the burden is on the prosecution to plead . . . that an abortion was not 'necessary for the preservation of the mother's life or health' " (402 U.S. at 71). In *Rabe v. Washington,* 405 U.S.313, 317, Chief Justice Burger, joined by Jus-

tice Rehnquist, said that while, in their opinion, the conduct there involved was punishable, the "charge did not give the notice constitutionally required."

In *United States v. Fiorito*, 465 F.2d 431 (7 Cir. 1972), an indictment brought under Title 18 U.S.C. App. §1202(a) was dismissed because it failed to contain the elements of the offense as the same was set forth by this Court in *United States v. Bass*, 404 U.S. 336. In *Fiorito*, the Government conceded and the court found "that the indictment is fatally defective in that it merely charges that appellant, who had previously been convicted of a felony, possessed firearms, with no allegations of any nexus with interstate commerce." (465 F.2d at 431). The court said: "After the conviction which is the subject of this appeal, the United States Supreme Court construed this statute and . . . held . . . that the possession of a firearm 'in commerce or affecting commerce' is an element of the offense. . . . As the indictment fails to state an offense, it must be dismissed." (465 F.2d at 432).

In *United States v. Beard*, 414 F.2d 1014 (3 Cir. 1969), the court dismissed an indictment because it did not allege the essential element or "unlawful or fraudulent intent". At trial, the judge included in his charge a reading of the statute in question and further instructed the jury that an essential element of the crime is action "with an unlawful or fraudulent intent". The court rejected the Government's contention that under the circumstances the failure to allege in the indictment the prescribed intent is a technical deficiency which did

not prejudice the accused. Quoting from *United States v. Manuszak*, 234 F.2d 421, 423 (3 Cir. 1956), the court said:

> ". . . [T]he count is a nullity as a charge of a federal crime and should be quashed. The defect is not one of form which will be overlooked after a verdict when no prejudice is shown. Although after a verdict every intendment should be indulged in support of the count, neither the verdict nor the evidence supporting the verdict can be used as a basis for dispensing with the rule that the indictment must state all the essential ingredients of the crime." (414 F.2d at 1015).

See also, *Smith v. United States*, 360 U.S.1, 9.

III

The Provisions of Title 18 United States Code §1461, on Their Face and as Construed and Applied to Authorize the Jury to Measure the Prurient Appeal of the Brochure by Its Impact on Undefined Sexually Deviant Groups Rather Than Solely by Its Impact on the Average Person in the Nation as a Whole, Violated the Free Speech and Press Provisions of the First Amendment and the Due Process Provisions of the Fifth Amendment.

Petitioners have been met at every stage in the criminal proceeding with a different theory as to whether the brochure was to be measured by its impact on the average person or its impact on some undefined sexually deviant group. The Court of Appeals recognized that Petitioners "were charged with dealing in obscene materials which appealed to the prurient interest of the *average person*. The Government so stated in its

pretrial answer to the appellant's request for particulars." (481 F.2d at 320-321) (Emphasis in original). Nevertheless, as the court below observed, the Government's expert witness was permitted to give opinion testimony "over the objections of the [petitioners] that the material appealed to the prurient interest of homosexuals, group sexual activists and persons interested in masochism, pedaphilia and zoophilia." (*Id.*) Over objection, the court instructed the jury that it was free to convict petitioners if it found that the brochure appealed to the prurient interest of undefined sexually deviant groups.

The Court of Appeals assumed that the testimony concerning sexually deviant groups constituted a variance of proof under the Government's answer to the bill of particulars, but concluded that this was not prejudicial because the testimony with regard to sexually deviant groups was allegedly directed to *The Illustrated Report* only and not to the brochure (481 F.2d at 321), and because petitioners' own experts allegedly covered the same field (481 F.2d at 322).

Concerning the court's instruction that the jury could measure the brochure by its appeal to the average person or some clearly defined sexually deviant group, the Court of Appeals concluded that when the instructions "are taken as a whole" the jury was properly instructed to measure the brochure solely by its appeal to the prurient interest of the average person (481 F.2d at 321).

The Government now argues that the Court of Appeals was wrong on both counts. The Government contends that the evidence that various pictures appeal to the prurient interest of different sexually deviant groups

"was not at variance with the Government's answer to the bill of particulars." [Govt. Br. 52, n. 33].[3] The Government also argued that it was proper to instruct the jury that it could measure the brochure by its appeal to sexually deviant groups [Govt. Br. 52-54]. In *Russell v. United States*, 369 U.S.749, 769, the Court stated that at every stage in the criminal proceeding of that case the accused "was met with a different theory, or by no theory at all. . . . Far from informing [him] of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." Those words might appropriately be spoken in connection with this case.

On the merits, it is plain that the Court of Appeals was correct in holding that the brochure had to be measured *solely* by its appeal to the average person. The Indictment was in statutory language only and made no reference to sexually deviant groups. The Government's response to the bill of particulars stated that the Government charged that the brochure appealed to the prurient interest of the average person. There was no evidence in the record that the brochure

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[3]The Government argues that at pretrial the Government made clear its intention to show that the material appealed to the prurient interest of sexually deviant groups [Govt. Br. 52, n. 33]. Petitioners moved for an order directing the Government to elect whether it was charging an appeal to the prurient interest of the average person or some other group, which motion was denied [J.A. 96]. Petitioners advised the court that they were unable to adequately defend under the circumstances [J.A. 96-97]. Petitioners moved, unsuccessfully, to strike all of the Government's testimony on appeal to prurient interest of sexually deviant groups [J.A. 148]. Before adducing any evidence on this issue, petitioners sought clarification by the trial court of this still "unsettled question" [J.A. 160-163].

was designed for or primarily distributed to anyone other than an average person. Neither the charge nor the evidence justified the giving of an instruction on the appeal of the brochure to sexually deviant groups. For all practical purposes, petitioners were tried under the now discredited *Hicklin* test. [See, *Miller*, 413 U.S. at 33].

IV

The Provisions of Title 18 United States Code §1461, on Their Face and as Construed and Applied, Violate the Free Speech and Press Provisions of the First Amendment and the Due Process Provisions of the Fifth Amendment, Because the Trial Court Instructed the Jury That It Could Find the Brochure Obscene Even if the Brochure Did Not Meet the Roth-Memoirs Test if the Jury Found "Pandering", Notwithstanding the Fact That Neither the Statute nor the Indictment Fairly Advised Petitioners That They Were Charged With Pandering.

The Government states that the propriety of the court's pandering instruction is "clearer when it is considered that the advertisement was being evaluated not only as a document charged as obscene in and of itself, but also as an advertisement of *The Illustrated Report*, an obscene book." [Govt. Br. 58]. The book is not obscene. On the contrary, it is plainly protected by the free speech and press provisions of the First Amendment. A book is presumed to be protected by the guarantees of the First Amendment unless and until it is proven to be obscene. The Government failed to satisfy the jury that the book was obscene. It is, therefore, entirely incorrect for the Government to attempt to justify giving a pandering instruction on the false assumption that the book is obscene.

The record contains no evidence of pandering. The brochure does not proclaim the book it advertises to be obscene. Indeed, the text of the brochure asserts the opposite. The entire thrust of the brochure is that *The Illustrated Report* furthers knowledge and understanding of an important political and social issue and contains important scientific information. The dominant note of the brochure is political. It asserts, in shorthand fashion, that the American people have nothing to be afraid of in viewing sexually explicit material. The brochure is not "a deliberate representation" of *The Illustrated Report* as erotically arousing. It is not an attempt at titillation. Rather, it is an appeal to reason. Moreover, a brochure cannot pander itself. *United States v. Pellegrino*, 467 F.2d 41 (9 Cir. 1972). See also, *United States v. Pinkus*, 333 F.Supp.928 (C.D. Calif. 1971).

The legislative history of Title 39 United States Code §3008—"Prohibiting of Pandering Advertisements"—discloses that its provisions were "not intended to prohibit" pandering material from being sent through the mails, if the individual to whom it is addressed wishes to receive it. [Br. for Pets. Hamling, *et al.*, 55-56]. The Government cites Title 39 United States Code §3011(e) in answer to petitioners' argument that Congress, having authorized the initial mailing of "pandering advertisements", the Government cannot now attempt to prove that petitioners violated 18 U.S.C. §1461 because they allegedly mailed such advertisements.[4] Title 39 U.S.C. §3011(e) provides that "nothing in this section or in section 3010 shall be construed as amending, preempting, limiting, modifying

[4]Petitioners deny that the brochure was a "pandering advertisement" [See, Br. for Pets. Hamling, *et al.*, 56, n. 9].

or otherwise in any way affecting section 1461. . . ." Section 3011(e) however was not in effect at the time petitioners allegedly mailed the brochure in December of 1970 and January of 1971. Section 3011(e) was enacted August 12, 1970 and became effective on the first day of the sixth month which begins after August 12, 1970, *i.e.*, on February 12, 1971, approximately one month *after* the last mailing of the brochure. See, *Pent-R-Books, Inc. v. United States Postal Service*, 328 F.Supp.297, 304-305 (E.D. N.Y. 1971). Prior to §3011(e) becoming effective, this Court held the predecessor to §3008 constitutional. *Rowan v. U.S. Post Office Dept.*, 397 U.S.728.

Congress, having addressed itself to the question of "pandering" in the mail, the "pandering" doctrine, announced in *Ginzburg v. United States*, 383 U.S.463, is now without vitality where the statutes operate.

V

The Brochure at Issue Is Protected by the Free Speech and Press Provisions of the First Amendment to the United States Constitution. It Is Neither Obscene in Fact nor in Law.

In *Miller*, the Court said: "The First Amendment protects works which, taken as a whole have serious . . . political or scientific value, regardless of whether the Government or a majority of the people approve of the ideas these works represent." (413 U.S. at 35). The Court emphasized the importance of keeping open "the free and robust exchange of ideas and political debate" (*Id.*). *The Illustrated Report* plainly has serious political and scientific value. It was those values that the brochure emphasized. An advertisement for a book is an essential link in the whole chain of communication

which makes freedom of press a reality. See, *New York Times Co. v. Sullivan*, 376 U.S.254, 266; *Smith v. California*, 361 U.S.147. Although it is true that petitioners were engaged in a commercial enterprise, no weight is to be ascribed to the fact "that petitioners have profited from the sale of publications which we have assumed but do not hold cannot themslves be adjudged obscene in the abstract; to sanction consideration of this fact might indeed induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzburg v. United States*, 383 U.S.463, 474. The brochure, like the book it advertises, is protected by the free speech and press provisions of the First Amendment.

VI

Petitioners Were Denied a Fair Trial, and Due Process of Law, When the Trial Court, in Open Defiance of Rule 30, Federal Rules of Criminal Procedure, Denied Petitioners the Opportunity to Make Objections to the Court's Jury Charge Outside the Presence of the Jury.

There is unanimity of opinion that Rule 30 of the Federal Rules of Criminal Procedure was violated when the court denied petitioners an opportunity to make objections to the court's charge "out of the presence of the jury".

The Government commences its argument by asserting, erroneously, that "for the purposes of the present controversy Rule 30 is an exact copy of Rule 51 of the Federal Rules of Civil Procedure" [Govt. Br. 69]. The Government sets forth the provisions of Rule 30

[Govt. Br. 68, n. 38] and the provisions of Rule 51 [Govt. Br. 69, n. 39]. A reading of the last sentence of each Rule reveals that under Rule 51 "opportunity shall be given to make objections to the charge out of the hearing of the jury." Under Rule 30, "opportunity shall be given to make such objections out of the hearing of the jury *and, on request of any party, out of the presence of the jury.*" The italicized words were added in 1966. It thus appears that the language of Rule 30 and Rule 51 is crucially different on the issue herein.

Since passage of the 1966 amendment to Rule 30, no conviction has been affirmed where an accused was denied the opportunity of making objections to the jury charge out of the presence of the jury, where such a request was properly made. Petitioners plainly made a proper request [J.A. 257]. Six of the cases cited by the Government in support of its position were decided prior to the 1966 amendment. *Sulton v. United States*, 249 F.2d 385 (5 Cir. 1957); *Hodges v. United States*, 243 F.2d 281 (5 Cir. 1951); *United States v. Hall*, 200 F.2d 957 (2 Cir. 1953); *United States v. Titus*, 221 F.2d 571 (5 Cir. 1955); *Lovely v. United States*, 169 F.2d 386, 391 (4 Cir. 1948); *Swain v. Boeing Airplane Co.*, 337 F.2d 940 (2 Cir. 1964). Even before the 1966 amendment, judgments were reversed for failure to permit objections to be taken out of the presence of the jury. *Hodges v. United States*, 243 F.2d 281 (5 Cir. 1957). See, *Lovely v. United States*, 169 F.2d 386, 391 (4 Cir. 1948). After the 1966 amendment, courts of appeal reversed judgments of conviction for a viola-

tion of Rule 30 in the following cases: *Hall v. United States*, 378 F.2d 349 (10 Cir. 1967); *United States v. Fernandez*, 456 F.2d 638 (2 Cir. 1972); *United States v. Schartner*, 426 F.2d 470 (3 Cir. 1970); *United States v. Huffman*, 467 F.2d 189 (6 Cir. 1972). [See, Br. for Pets. Hamling, *et al.*, 78-83.]

The court below stated that the rule announced in *United States v. Schartner, supra*, was the one to follow (481 F.2d at 325). In *Schartner*, as in the case at bar, the Government contended that the trial court's refusal to obey Rule 30 was harmless. The Third Circuit rejected this argument, stating that

> "there should be reversal for noncompliance with Rule 30 even where the defendant cannot affirmatively prove prejudice. Rule 30, as we have indicated, was designed to avoid subtle psychological pressures upon the jurors which would arise if they were to view and hear defense counsel in a posture of apparent antagonism toward the trial judge. . . . These pressures would be largely imperceptible, and it would be very difficult for a criminal defendant to prove their presence in a particular case. . . ." (426 F.2d at 479).

Petitioners believe that the rule announced in *Hall v. United States*, 378 F.2d 349 (10 Cir. 1967) is correct. But even under *Schartner*, petitioners are entitled to a reversal.

VII

Petitioners Were Denied a Fair Trial by an Impartial and Representative Jury, in Violation of the Guarantees of the Fifth and Sixth Amendments.

A. The Trial Court Abused Its Discretion and Denied Petitioners Due Process of Law When It Refused to Grant a Short Continuance Which Would Have Afforded Petitioners a Jury Panel Which Did Not Systematically and Absolutely Exclude All Persons Under 24 Years of Age.

The trial court recognized that young persons were in fact excluded from the venire and that such young persons would be better jurors for petitioners. The trial court said: "It may well be that the best possible of all worlds for the [petitioners] in this case would be to have jurors from age 18 to age 25. . . ." [R.T. 91]. The trial court also recognized that "it is time to change the jury master wheel" [R.T. 93] because of its exclusion of young persons. Petitioners moved for a short continuance so that young persons would be in the jury wheel and become potential trial jurors. The Motion for a Continuance was denied.

The Government argues that the trial court acted within its discretion in denying petitioners' Motion for a Continuance. It is true of course, as the Government contends, that the court is invested with a broad discretion in granting or denying a continuance [Govt. Br. 74]. But the discretion is not without its limitations. This Court has had occasion to observe that one way to attempt to assure that an accused is tried by a fair and impartial jury "is to grant a continuance of the trial".

Groppi v. Wisconsin, 400 U.S.505, 510. The Court, quoting from *Irvin v. Dowd*, 366 U.S.717, 722, said:

> "In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial . . . jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. . . . In the ultimate analysis, only the jury can strip a man of his liberty or his life."

In *Sheppard v. Maxwell*, 384 U.S.333, 354, n. 9, the Court said:

> "At the commencement of trial, defense counsel made motions for continuance and change of venue. . . . Without regard to whether the judge's actions in this respect reach dimensions that would justify issuance of the habeas writ, it should be noted that a short continuance would have alleviated any problem with regard to the judicial elections. The court in *Delaney v. United States*, 199 F.2d 107, 115 (C.A. 1st 1952), recognized such a duty under similar circumstances, holding that 'if assurance of a fair trial would necessitate that the trial of the case be postponed until after the election, then we think the law required no less than that.' "

The Government relies on *United States v. Rosenthal*, 470 F.2d 837, 844 (2 Cir. 1972), where the court stated that the decision whether to grant a continuance rests within the discretion of the district judge

subject to the requirement that his decision be reasonable. In the case at bar, petitioners contend that the judge's decision denying a short continuance was unreasonable, because it forced petitioners to trial before an age-biased jury.

B. The Trial Court Abused Its Discretion and Denied Petitioners Due Process of Law When It Improperly Refused to Ask Prospective Jurors Questions on Voir Dire Designed to Expose Their Biases and Prejudices Concerning "Obscenity" and Sex.

Although petitioners requested the court to do so, it refused to ask the prospective jurors any questions concerning the effect their religion may have on their attitudes towards sex and obscenity. Similarly, the court refused to ask the jurors whether they made contributions to or were associated in any way with the Citizens for Decent Literature and a number of other questions designed to expose the attitudes of the prospective jurors concerning obscenity and sex. [Br. for Pets. Hamling, *et al.*, 94-95]. Because of the highly emotional nature of the subject of obscenity, petitioners should have been allowed to make the inquiries they suggested to the court. The petitioners were denied a fair opportunity to question prospective jurors, so that they would have some basis for a reasonably knowledgable exercise of the peremptory challenge.

VIII

Petitioners' Fifth Amendment Rights to a Neutral and Unprejudiced Grand Jury Were Violated Because the Government Attorney Made Biased and Prejudiced Remarks to the Grand Jury Which Returned the Indictment.

The Government argues that petitioners' "unsupported allegations do not overcome the presumption of regularity which attends grand jury proceedings" [Govt. Br. 78]. Petitioners' complaint is not based on "unsupported allegations". Petitioners called to the witness stand the government attorney who presented the case to the Grand Jury which indicted them. He testified that he advised the Grand Jury to be "guided solely by their instinctive feelings. . . ." [R.T. 19-20]; that they were to be guided by the standards of "moral judgment" which they had "assimilated through the totality of their experiences" [R.T. 20-21]; that they were "the sole judges of the contemporary community standards of this country"; and that the term "contemporary community standards" refers to the "average conscience of the time" [R.T. 33].

The government attorney also testified concerning facts in the *Ginzburg* case, although he was not sworn as a witness [R.T. 26-29].

This evidence overcomes "the presumption of regularity which attends grand jury proceedings".

Conclusion.

Petitioner Hamling has been sentenced to prison for four years, for allegedly violating §1461. He and the corporate defendants have also been sentenced to pay heavy fines. Concededly, petitioners' trial took place in

a "no-man's land". They were, as the Government properly observed, "caught in a period of transition", their prosecutions having taken place before the *Miller* decisions. For the foregoing reasons, the judgments of conviction should be reversed with instructions to dismiss the Indictment.

Respectfully submitted,

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